Cities; Nevada Public Agency Insurance Board; the Pershing County Board of Commissioners; the Reno Sparks Convention Visitors Authority; the Nevada Attorney General; the State of Nevada Employees Association in Washoe County school district, White Plain County, to name just a few.

I find it incomprehensible to believe that all of these folks are simply tools of class action plaintiff lawyers. I just do not think that a fair analysis—just using our own intuitive judgments, why would all of those folks in our State, as many other States, have expressed those concerns? They have expressed those concerns, Mr. President, because cities and school boards rely upon the securities market. They have investor portfolios. They are potential victims of fraud.

The Orange County situation is one that each of us is familiar with. They want to be sure on behalf of the local county or city or school district, whatever the entity might be, that if indeed they are victimized by fraud, they can be covered on behalf of the constituents whose money ultimately is what is at risk. That is why I have asserted every American has an interest in the outcome of this legislation.

I yield the floor and I thank the chairman for his great courtesy in allowing me to proceed at some length when I know he has been waiting a while.

Mr. D'AMATO. Mr. President, I ask unanimous consent for the purposes of bringing the Senate up to date, that I may be permitted to proceed for no longer than 5 minutes in morning business.

The PRESIDING OFFICER (Mr. SMITH). Without objection, it is so ordered.

SUBPOENA ENFORCEMENT

Mr. D'AMATO. Mr. President, yesterday, after a full day of debate, the Senate voted to authorize Senate legal counsel to go to court to enforce the subpoena of the Whitewater Special Committee for the notes of William Kennedy. Mr. Kennedy took these notes at a Whitewater defense meeting at the offices of Williams and Connolly. This meeting was attended by private counsel for the Clintons and four Government employees.

I have today asked the Senate legal counsel to begin the process of enforcing the subpoena as quickly as possible. The Senate will ask the court to rule on a Senate enforcement action on an expedited basis so that we can get a determination in the courts as quickly as possible.

Now, the Senate legal counsel will file papers with the court on Wednesday, December 27. There are a number of things he must do prior to that. I have been informed he has attempted to contact counsel for Mr. Kennedy, personal counsel for the President and Mrs. Clinton, and the White House counsel to discuss a schedule in order to obtain a court ruling as fast as possible. That is so that we can have an expedited proceeding. I hope they will try to arrange for that.

As I have said repeatedly, and I want to reiterate, the Senate will stop any action to enforce the subpoena as soon as we have Mr. Kennedy's notes. Until that time, though, we will continue and take all action necessary to enforce the subpoena. So there will be no mistake, while I hope we can get these notes without having to go to court, we are not going to wait or delay and then have a situation where negotiations may break down. I understand they are negotiating—that is, ''they'' being White House counsel and the President's counsel—right now with Members of the House.

As I said before, I believe that the Senate and the American people have a right to all of the facts about Whitewater. If these notes help us obtain those, certainly, they should be provided. Again, we are going forward, but I say if we get the notes we will stop the proceedings. At this time, though, we are attempting to get an expedited proceeding. It is our intent to be in court on December 27.

Mr. President, I thank my colleague for permitting the opportunity for bringing that update.

Mr. SARBANES. Mr. President, will the Senator yield for a moment?

Mr. D'AMATO. Certainly.

Mr. SARBANES. Is the Senator now going to address the securities bill?

Mr. D'AMATO. Yes. I asked I might be permitted to proceed in morning business for no more than 5 minutes, just for the purposes of that update. That was the only thing I asked. But I was now going to address the securities reform litigation.

Mr. SARBANES. I would like to address the issue the Senator addressed. I can defer until he finishes the securities matter?

Mr. D'AMATO. No, I yield to my friend, certainly. I think it would be appropriate, if he wants to do that, to yield to him now for purposes of making his remarks at this time.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, I appreciate the Senator from New York yielding.

I think the report that was just brought to the floor underscores what I thought was the wisdom and the reasonableness of the amendment that was offered yesterday and the suggestion that we ought to try to resolve this matter without moving to a confrontation. I listened carefully to my colleague. As I think he said, he intends to be in court on the 26th——

Mr. D'AMATO. The 27th.

Mr. SARBANES. That is, I think, where the majority has intended to be all along. We have consistently suggested if we would draw back here and try to resolve this matter, it could be worked out without a court test.

The assertion is made that by going to court, they will speed the process up. In fact, they will slow it down. That is very clear. Even under expedited procedures, it is going to take a fair amount of time to carry this matter through. So, if you want to get a quick resolution of it, obviously the way to do it would have been to follow the path that we outlined yesterday with respect to the furnishing of the notes and to try to have worked in obtaining from the House an agreement or understanding with the White House that would make it possible for them to do so.

They have offered to do it. They have obviously come forward in an effort to try to do it.

This push to the courtroom, I think, is simply to create, as it were, a public issue and a confrontation. As I indicated yesterday, I regret that. I continue to regret it. I think it is unnecessary. I think it is a provoked controversy, largely for political content. I think as these other negotiations seem to bear fruit, it only underscores that point.

I do think if the matter is carried to court and resolved there, that we may end up with it being clear that a very serious mistake was made by the Senate.

I thank the Senator for yielding.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, I am not going to speak for more than 30 seconds on this whole issue of the subpoena. I just wanted to serve notice and let the administration know that, again, if they successfully complete their negotiations with whoever they are negotiating with—the House and whatever Members—that is fine, as long as we get the notes. If we do not, if it gets protracted, we will continue. I have to do that so that the process does not break down. So I thought I would at least bring us up to date on that.

SECURITIES LITIGATION REFORM ACT—VETO

The Senate continued with the reconsideration of the bill.

Mr. D'AMATO. Mr. President, I urge my colleagues to remain firm in their support of this legislation, legislation that, just two weeks ago, was passed overwhelmingly in the Senate, legislation that was passed overwhelmingly in the House, legislation that was clearly, once again, approved by the House, when the President's veto was overturned by a huge majority, the vote was 319 to 100.

It is here now for us to consider. Let me say, Mr. President, no one can argue that the current system is not broken because it is broken. Some of my colleagues raise some objections related to pleadings, the pleading requirements and some things of a very technical nature—whether or not, for example, the second circuit opinion should be incorporated into this law—we are really getting into hair splitting.

But I will tell you an area where no one can split hairs, no one can divide. The system as it presently exists is shameful—shameful—horrendous. This system does not protect investors. This is the Full Employment Opportunity Act for a handful of lawyers. They are out there mining, prospecting for gold. They do not protect the average citizen. They do not protect the small fry investor.

Let me tell you what the leading advocate of this system says, as it relates to the practice of law. He says, and I quote, ''I have the best practice in the world.'' Do you know why he says that? It is amazing. Does he say it because he is able to help people? Because he is able to bring comfort to them? Because he is able to help widows and orphans who are in need, who have been ripped off? That he has helped? That would be laudable. Does he say that because he is able to go after those who have robbed, who have pilfered, who have cheated? That would be laudable.

''I have the best practice in the world,'' he says. And why? ''Because I have no clients.''

That is a heck of an attitude. And that is what exists. And he is working, working. I wonder how many millions of dollars—millions, he, himself, has pumped into the system to buy ads to scare people, to tell them they are going to take their rights away.

What we are looking to do is see to it that investors are protected, not a handful of attorneys, and one in particular, an attorney who says, ''I have the best practice in the world because I have no clients.'' His words. Why does he not come to the floor and explain that? Let him come out here and tell us how he can justify that kind of sentiment to the Senators who are going to be voting.

Does he care about widows? Orphans? Defrauded people? He cares about his pocketbook. He hires a bunch of people to file claims—hires them, professional plaintiffs we call them. Some of them get as much as $25,000, not based upon what the injury was to them.

How would you like to be this stockholder? You have 10 shares—that is what some of these guys own, 10 shares. They buy shares in every company. If the stock of the company goes down, they are recruited, the same handful of professional plaintiffs. You see, each one of them buys a share, a couple of shares in each company. If the share goes down, four or five of them sign up and this lawyer runs into court. He is now representing all the shareholders. In most of those cases, his shareholders do not own anything worth anything. You cannot even say one-tenth of 1 percent. So, when he says he represents no clients, he means that.

Now, he is in there representing, supposedly, all of the shareholders. Our bill says you cannot have professional plaintiffs anymore. You cannot have the same bunch of thieves, because that is what they are—thieves for hire. And we permit them, today, under the law. They should be banned, outlawed, they are robber barons.

Here is this lawyer who is pumping in hundreds and hundreds of thousands to protest this bill. I have not heard anybody talking about him. I have not seen anybody talking about how much money he has siphoned into various groups, money he has funneled to them so they can run their phony ads, how they fund these little groups who say, ''Oh, I am for the little guy.''

Little guy my foot. This millionaire lawyer is going around funding everybody. Why should he not? He makes tens of millions of dollars. Remember who his clients are—nobody. He is operating for himself. He is an entrepreneur—not my words, his words. ''I have the best practice in the world. I have no clients.''

It is a disgrace. We should change this system. And that is what this bill does. It protects, for the first time, people who own shares. It allows the pension fund managers who are managing hundreds of millions of dollars to have a say as to who will be selected to lead in the representation of investors when there is fraud and exploitation. Has there been exploitation? Absolutely. We have operators like Charles Keating, where people unjustly have enriched themselves at the expense of shareholders, stockholders, and pensioners. Of course, we must get them and put them in jail.

This legislation makes it easier for the Securities and Exchange Commission to do exactly that, to bring lawsuits. We created greater responsibility on the part of auditors and accountants for the first time in this bill. But, my gosh, let us not say that we have a system that is a good system when it is out of control, when we permit legal larceny because somebody may have some economic power, so, therefore, we permit someone else to hold them up and say, ''If you have even the tiniest bit of negligence, we are going to hold you liable for whatever the loss is even if you were not part of a conspiracy because you could have done better.'' Our laws should not work on that basis. It should be worked on the basis of fairness, what is fair and what is right.

It is really long overdue, the need to reform this kind of litigation from a money-making enterprise for a handful of lawyers—and it is a handful of lawyers—into a better means of recovery for those who have lost out. Curtailing abusive securities litigation while allowing investors to bring meritorious lawsuits will permit investors to have a system of redress that serves them, not one that entraps them. This bill serves investors and not a handful of lawyers who are proud to claim that they have the best practice because they have no clients.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I want to address the securities reform veto override. It is my intention to support the override effort, and I would like to summarize for the RECORD my views on the legislation and my reasons for supporting the bill. Because the senior Senator from Connecticut is here, I would like to ask him a series of questions, if I might, and see if I am correct in my assumptions, and, if I am not, give him the opportunity to clarify my concerns. As you know, the senior Senator is one of the main cosponsors of this bill.

The first involves the so-called license to lie challenge to the safe harbor. I spent about 6 hours with various representatives of the high-technology companies and representatives of the SEC on the safe harbor. At the time the SEC would not sign off on language that they wanted and included in the bill. Subsequently, SEC Chairman Arthur Levitt did sign off on the safe harbor legislation, a decision confirmed by letter from Chairman Levitt, that has already been introduced into the RECORD.

I would like to state my understanding of the safe harbor and see if the senior Senator of Connecticut concurs.

To claim the protection of the safe harbor, an individual company officer must clearly identify the statement, either written or oral, as a forward-looking statement. By forward-looking statement, I mean a statement that applies it to economic projections, estimates, or other future events. The safe harbor cannot be claimed by certain groups of individuals—and I will go into that shortly. This statement must be accompanied by meaningful cautionary statements, identifying important factors that could cause actual results to differ materially from the forward-looking statement. That is to say, the statement must be accompanied by a clear warning that identifies the risk that the future may not turn out as forecast. This warning cannot be routine warning language, but must be specific to the forward-looking statement.

Is that a correct understanding of this bill?

Mr. DODD. Mr. President, I say to my colleague from California that she is absolutely correct. This is exactly what the meaning of that safe harbor language is.

Mrs. FEINSTEIN. I thank the Senator. If the statement is oral, it is my understanding that the individual must identify the statement as forward-looking; clarify that actual results may differ materially; and, state at the same time that additional information about the forward-looking statement is contained in a readily written available document with additional information which satisfies the same warning standard required of written standards.

Mr. DODD. Mr. President, I further say to my colleague from California that is absolutely correct.

Mrs. FEINSTEIN. Or, as a separate test, as I am led to believe, the safe

harbor does not apply if the statement is made with ''actual knowledge'' that the statement was ''an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading.''

Mr. DODD. Mr. President, the Senator from California is correct as well on that.

Mrs. FEINSTEIN. I appreciate the Senator from Connecticut's comments, which, I believe helps clarify the scope of safe harbor.

Let me go on.

As I understand it, the protections of the safe harbor are not available to reduce the obligations of companies to disclose historical information or current information truthfully and accurately. For instance, if a company makes misleading statements about known facts, the safe harbor does not protect the company.

Mr. DODD. That is correct, I say to my colleague.

Mrs. FEINSTEIN. I further understand the safe harbor provisions do not apply to certain companies we may have reason to have some doubt about, such as penny stock companies, initial public offerings known as IPO's, blank check companies, roll-up transactions, or companies recently convicted of specific securities law violations. All of these types of companies are excluded, as I understand it, from the protection of the safe harbor provisions. The provisions are only available to companies with an established track record.

Mr. DODD. Mr. President, I say to my colleague from California that is absolutely correct.

Mrs. FEINSTEIN. I thank the Senator.

As we discuss companies or individuals ineligible for the safe harbor, I would also want to clarify the safe harbor does not apply to brokers or analysts who may have an incentive to oversell a stock to obtain a sale. On this point, the safe harbor would not have applied to the financial concerns we experienced in Orange County, California. If Merrill Lynch is a broker selling derivatives to a county government, in my state of California or any other state, they are not protected by the safe harbor because the safe harbor does not protect brokers and does not address derivatives.

Mr. DODD. The Senator from California is correct.

Mrs. FEINSTEIN. I understand the safe harbor does not apply to a new company, but only applies to seasoned issuers. For instance, NetScape, a new high-technology company, which saw its stock explode from zero to $120 a share or more, can claim no protection under the safe harbor because it is an initial public offering.

Mr. DODD. That is correct.

Mrs. FEINSTEIN. Finally, I wish to clarify for the record that the safe harbor does not affect the jurisdiction of the Securities and Exchange Commission or the SEC's authority to work with the Justice Department to bring enforcement actions against wrongdoers for fraud, insider trading or any other enforcement action. So, in other words, the safe harbor cannot be used as a defense against the jurisdiction of the Securities and Exchange Commission.

Mr. DODD. Mr. President, I say to my colleague from California that is absolutely correct.

Mrs. FEINSTEIN. I very much thank the Senator. I would like to go on and specifically address the concerns of cities because I have received exactly some letters from various cities, 26 or so to be precise, indicating their concern. We have taken a good look at it.

I think one of the core lessons about Orange County is that cities should not be investing in speculative investments. I know from my tenure as mayor of San Francisco for 9 years, and I served on the investment body which was then the retirement board, these kinds of speculative ventures were prohibited.

We have heard some discussion about the financial concerns involving Orange County, CA, but as was discussed earlier, these circumstances would not be altered by the safe harbor under the bill. In Orange County, the treasurer was buying derivatives from Merrill Lynch. Derivatives are not protected by the safe harbor. Further, Merrill Lynch, serving as a broker, is ineligible to claim safe harbor protection. So you have protections built in two different ways. Derivatives are not protected, and a broker is not protected.

I believe—and my vote is cast on this belief—that the cities' concern appears primarily to address the proportional liability section of the bill. Under the proportional liability rules adopted in the bill, an accountant from a big accounting company would not risk bearing the full cost of a plaintiffs' loss if it audits the books, certifies them and fraud causing loss to plaintiffs subsequently arises. However, even the proportional liability rule, as I understand it, has a significant protection built in.

While the bill adopts a proportional liability rule, proportional liability will not limit the responsibility of a business or an individual who commits ''knowing securities violations.'' I think that is very important. Such an individual would remain responsible to pay, not the proportional loss, but the full loss, as I understand it.

I know the senior Senator from Connecticut will correct me if he believes that is inaccurate.

''Knowing securities fraud'' includes any defendant who had actual knowledge, or operated under circumstances in which they should have had knowledge, the fraud occurred.

So the provision will not permit accountants who commit knowing securities fraud to eliminate full liability for accountants who deserve to be fully liable. Would the Senator agree with that?

Mr. DODD. The Senator from California is correct, I would say, Mr. President, with that observation.

Mrs. FEINSTEIN. I think that is very important to the cities that are watching this debate.

Further, special rules are provided to force proportionally liable defendants to pay more if a particular plaintiff suffers a high level of losses. A significant part of the debate revolves around our concern for poor and potentially vulnerable plaintiffs. Under this bill, if a plaintiff can claim damages exceeding 10 percent of their net worth, and their net worth is less than $200,000, then a defendant remains fully liable for that loss to the plaintiff and no proportional liability can be used to reduce that liability.

Additionally, many of us have concerns with the application if this law in instances involving insolvent defendants. If a defendant cannot pay due to bankruptcy, the defendants who would otherwise be only proportionally liable must pay up to 50 percent more to make up the plaintiff's shortfall due to the bankruptcy. What this means is that if the battle comes down to an innocent plaintiff who loses and a proportionally liable defendant who feels it would be unfair to force them to bear the full loss, the defendant loses and the proportionally liable defendants must pay more.

These are very important concepts to me, and I wanted to come to the floor to place my understanding with respect to legislative intent in the RECORD. I am very pleased that the senior Senator and author of this legislation is present and has corroborated these statements.

I thank the Chair. I thank the Senator. I yield the floor.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I thank you very much.

My senior Senator from California and I usually, when it comes to issues affecting our State, come down on the same side. We have clearly come down on opposing sides here. Before she leaves the floor, I just wanted—I do not ask her to stay because I know she has other pressing matters—to talk about the breadth and the depth of the opposition to this bill and the support for the President coming from local elected officials in our home State where she served, as we know, as an esteemed and extraordinary mayor of the city and county of San Francisco. I served on the board of supervisors in neighboring Marin County for 6 years and its president for a time.

I think what is important here is that authors of the bill feel very strongly in their work product, what they do and their intentions. I have never once doubted the intentions of those who have brought this to us, that their prime intent was to make sure that frivolous lawsuits were a way of the past. But it is the people who invest in securities who have looked at this from the standpoint of protecting investors, and I have never seen such a

list of county officials that I placed in the RECORD from almost every single county in California, from the county administrators to the treasurers, to tax collectors. These are the people who know that they need to have protection from those who would seek to take advantage of investors. This list is extraordinary.

The League of California Cities wrote a letter to the President dated December 5, 1995:

As representatives of municipal Government who oversee billions of dollars in investments, we strongly urge you to oppose the Securities Litigation Reform Act.

And they say:

Any securities litigation reform must achieve a balance between protecting the rights of defrauded investors and protecting honest companies from unwarranted litigation. Abusive practices should be deterred and sternly sanctioned. However, we believe that investors would be penalized and become victims of security fraud and that wrongdoers would be rewarded.

And they call it ''an anti-investor bill which would impose new and blatantly unfair requirements on the victims of fraud, making it very difficult for them to seek redress through the courts.''

Now, the number of California governments opposed to this is staggering—not only governments but agencies: The Alameda County Employees' Retirement Association, Amador County Treasurer/tax collector, the treasurer of the AFSCME local in Pasadena, the Calaveras County Board of Supervisors, California Association of Treasurers and Tax Collectors, California Association of County Treasurers—we have more than 50 counties in our State—California Council of Senior Citizens Clubs of San Diego and Imperial Counties, California County Administrative Officers Association—that is the association of the administrators of counties, over 50; I am just listing a few here—the California Labor Federation, the California Government Finance Officers Association, the California Municipal Treasurers Association, the California Public Interest Research Group, the California State Association of Counties, the city of Albany, the city of Arcadia, the city of Barstow, the city of Beverly Hills, the cities of Burbank, Burlingame, El Monte, Fairfield, Fremont, Glendale, Hayward, Hemet, Huntington Beach, Irvine, Long Beach, Manhattan Beach, Moreno Valley, Newport Beach, Oceanside, Ontario, Riverside, the city of San Bernardino, San Fernando, San Francisco, Mayor Frank Jordan; city and county of San Francisco board of supervisors, city of San Jose, Mayor Susan Hammer; city of Santa Ana, city of Santa Rosa, city of Santee, city of South Pasadena, city of Stockton, city of Thousand Oaks, city of Ventura.

Why am I doing this? Because I am trying to make it clear that the opposition to this legislation is broad and it is deep. I will stop mentioning the cities, and I will shift to some of the counties: Del Norte County, El Dorado County, Fresno County, Glenn County, Humboldt County, Imperial County, Inyo County, Kern County, Kings County, Lake County, Lassen County treasurer/tax collector, Los Angeles County Employees Retirement, Los Angeles County Federation of Retired Union Members, Marin County—that is where I am from—Employees Retirement Corporation, Mariposa County, Mendocino County—I am at the M's. It goes on and on: San Diego County treasurer/tax collector, Sacramento County treasurer/tax collector, San Francisco Democratic County Central Committee, San Joaquin County, San Luis Obispo County, Santa Barbara County treasurer/tax collector, Senior Meals and Activities, Service Employees International.

Then it goes to the T's and the U's and the V's, and it ends with Yuba County Supervisors, county administrator and the treasurer/tax collector. And the number of editorials has been just extraordinary from my State.

One has to wonder why this has happened, and I think it is because this is a very complicated matter.

My friend from California had several problems that she wanted to clarify, and she feels comfortable that they have been clarified. But when you are rewriting securities law, Mr. President, which has protected investors since the 1930's, it is very complicated, and as a former stockbroker I can tell you when people used to call me they trusted me. They trusted me. And the fact of the matter is I would lose sleep rather than give someone terrible advice. And that is one of the reasons I did not stay in that business. It was very, very difficult, because I worried every time the stock market went down and an elderly retiree called me the next day. I just felt it was an enormous responsibility. student. Unfortunately, in our great country, the greatest on Earth, with the greatest free market system and the greatest, frankly, laws protecting investors, there are people who would take advantage of the elderly and of people who really are not sophisticated. And it is easy to do.

What this bill does, as you look at it and its transformation, unfortunately, is give people like the Charles Keating and people who really do not care about other people an opportunity to rip off people because the legal system will not go after them.

The way the bill is written, the pleading requirements are so difficult plaintiffs would have a hard time even getting into court. And even if they get into court, you have a specter over your head that an unfriendly judge could decide, if you are an elderly, small investor, for example, that your lawsuit did not have merit and you are going to have to pay the bills of those on the other side. And that has a very chilling effect.

Therefore, when the President vetoed this bill, he said very clearly that he would love to sign a securities reform bill. He wants to sign a securities reform bill. He wants to make sure that there are fewer frivolous lawsuits. He wants to make sure, in fact, that people in the Silicon Valley, my constituents, the senior Senator from California's constituents, are not hit with strike suits. None of us wants that.

Unfortunately those with another agenda have prevented that. Instead of having a bill that goes after those lawyers that are filing frivolous lawsuits, to quote one of the newspapers, ''Instead, the bill stabs the small investor in the back.''

That is why we have so many county treasurers and county administrators and boards of supervisors and mayors and the League of California Cities opposed to the bill as it is now written—these people know they want to protect their employees and retirees investments.

Mr. President, as we enter the battle of the budget, and we fight hard—in my view, this is what the President is doing—fighting hard to protect the middle class, trying hard so that our elderly will have Medicare, and the seniors in nursing homes will have Medicaid when they need it, and we have student loans for our children, and we have the police on the beat for our middle-class and all communities—we cannot divorce this bill from that battle. Who would be hurt the most if we do the wrong thing, which the President thinks we are about to do, here?

Many of the experts in this field warn us about this bill. Who will pay the price if we do the wrong thing? Not the very wealthy because, if the very, very wealthy get bilked in one investment, they are still on their feet. They are OK. They can survive. Not the very, very poor, because the very, very poor do not have money to invest.

This bill is going to be aimed at the solid middle class, those people who saved for their retirement and suddenly find out when they are bilked that they have no recourse because the securities laws were reformed.

Mr. President, there is a difference between reform and repeal. And I think the President has laid that out. He is opposed to the pleading requirements. He is opposed to the safe harbor. Many of us believe is not a safe harbor at all, but a pirate's cove because all you have to say to be immunized is, ''This is an estimate. This is just an estimate of future activity.'' Then you can hide behind that language.

So I hope that we sustain the President's veto. It was a courageous thing for him to veto, in my opinion. It is going to be a very close vote one way or another, maybe one, two, or three votes. I just hope we will stand with the President because I think he is fighting for the middle class in this veto.

I yield the floor at this time.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California, Senator FEINSTEIN.

Mrs. FEINSTEIN. If I might briefly respond to my respected colleague.

It is interesting, I guess, in a State as big as California one can have some different constituencies. My mail is, oh, maybe over 100 to 1 for the legislation rather than opposed to it. When I read the letters from the counties, that is when I saw they were functioning under a misimpression of what the safe harbor actually did. That is why, in my colloquy with Senator DODD, I tried to clarify these concerns. As I stated earlier, first, the stockbroker who sold the derivatives to cities or counties would not gain the protection of the safe harbor because brokers are ineligible; and, second, derivatives would not be protected by the safe harbor. So I tried to straighten that part out.

I want to point out that in California we are going through an economic change. High technology and biotechnology is a big source of jobs now and in the future. It is estimated that 62 percent of the high-technology companies that went public from 1988 to 1993 have faced securities lawsuits. And 62 percent of the companies that have gone public in the last 5 years have faced securities lawsuits in the State of California. That alone indicates that there is a problem that needs to be addressed.

What has concerned me in the legislation is a desire to address the problem and not throw out the goose that laid the golden egg. I want to protect the small investor, protect the county, and yet do away with the kind of lawsuit that happens because a companies' stock drops, a suit is filed, they press discovery and they move and collect a large settlement from the company, when the suit may be baseless.

Those kinds of frivolous suits concern me. I think it is a legitimate function of government to attempt to reform that. I also think it is important that this legislation strikes a balance and protects the consumer. Based on what I have seen, I believe it does.

More fundamentally, if it is proven to have a flaw or a problem, that flaw or problem can in fact be corrected. As I understand, it this legislation has taken some 5 or 6 years now to develop. The bill has been refined and refined over time. The bill has finally passes both Houses, the veto override has been supported in the House of Representatives. It seems to me it is time to get on with it and give the kind of necessary reform that I believe this bill provides in an evenhanded manner. I thank the Chair.

Mrs. BOXER. Will my friend yield to me for just a comment? And that is, I respect her completely for coming down on the other side. Of course, there are two sides to every story. I was just pointing out that as a former stockbroker myself and having felt that responsibility on my shoulders, the people who I really do tend to listen to in these matters are people who do not have a stake in it, and that is the people who are the investors.

All they want is a safe securities market. I agree with my friend, we may be back here fixing this bill. I think that the President has given us a road map to do that. I do not want to go on except to close, and I know my friend from North Carolina has been so patient.

Money magazine has really taken this issue on. And I think they make a very good point here when they say,

> The President should not sign [the bill]. . . . Here's why: The bill helps executives get away with lying. Essentially, lying executives get two escape hatches. The bill protects them if, say, they simply call their phony earnings forecast a forward-looking statement and add some cautionary boilerplate language.

And they talk about the fact that legitimate lawsuits would not get filed. So reasonable people come down on different sides. I want reform, but I want to see it done in a way that we stop these frivolous lawsuits but we still protect the small investors. Thank you very much for your patience, I say to my friend from North Carolina. I yield the floor.

The PRESIDING OFFICER. The Senator from North Carolina is recognized.

Mr. FAIRCLOTH. I rise in strong support of the motion to override the President's veto of H.R. 1058.

Mr. President, securities litigation reform is extremely important to the future of our economy. Obviously, the President disagrees. It is unfortunate. The President pretends that he supports our high-technology industry, but his veto showed that he cares more about trial lawyers than the growth of business in this country.

The Wall Street Journal may have called it right. They said Bill Clinton could be the President of torts.

Mr. President, the irony of this is that it is not a partisan issue. The lead sponsor of this bill is my friend from Connecticut, who is chairman of the Democratic National Committee. Republicans and Democrats alike have recognized the strike suits are very serious problems.

Mr. President, America is the undisputed leader in technology. No other country comes close to our leadership in this area. But a small cadre of lawyers have found a way to make a living by launching these strike suits against companies.

This is wrong. It is hurting America, it is hurting our economic growth, it is slowing our job growth, and it has to stop. It is hurting our fastest growing high-technology business. This bill is a good start.

Mr. President, these lawsuits that have been filed against these companies have little to no merit, but they are filed for the purpose of blackmailing companies into settling rather than going to court. In other words, it is cheaper to buy them off than it is to fight it in court.

The cost of these suits to the American economy is no small matter. At the end of 1993, class action lawsuits were seeking $28 billion in damages—$28 billion—which is a staggering amount, and most of these lawsuits are totally worthless.

The committee has had example after example of how absurd the cases can be. For example, one individual has filed against 80 companies in which he held stock and, in most cases, an infinitesimal amount of stock. Another individual has filed 38 lawsuits, 14 of them with the same law firm.

Another man, a retiree since 1990, 5 years, has filed 92 lawsuits, one for every year of his age. He is 92.

One law firm files a securities suit every 5 working days, one a week. They are just churning them out, whether there is any validity or not. That is how much it takes to meet the payroll, so they churn out one a week. In many cases, these lawsuits are filed within hours of price stock drops. The National Law Journal reported that of 46 cases studied, 12 were filed within 1 day and another within a week of publication of unfavorable news about a company.

Anybody that has ever run a company knows that all the news is not always favorable, no matter how hard you work at it. Mr. President, a point to remember in this debate is that investors are not helped by these lawsuits. If the President vetoed this bill for the small investor, then he missed the point in what the bill was about, and he is wrong. He is not protecting the little investor, he is only protecting a cottage industry of trial lawyers who make a living out of these lawsuits, and they have made a very plush living.

Study after study shows that lawyers get the lion's share of the settlements. We had testimony that the average investor receives 6 or 7 cents for every dollar lost in the market because of these suits, and this is before the lawyers are paid and they get the lion's share of it.

A couple of weeks ago, Fortune magazine had a picture of two lawyers who said, ''Beware of this type of lawyers, they will destroy your company.'' That was the cover story. So this is going on and the business investment community is aware of it.

One of the significant parts of the bill allows courts to determine who the lead plaintiff is, one that is most adequate to represent the class, not a person who ran to the courthouse and got there first, and, in many cases, the way these suits have been filed, it is simply who got to the courthouse first, not who had the real vested interest.

If the President wants to protect investors, this is the bill to do it. The lead plaintiff must file a sworn statement that he or she did not buy the securities at the direction of counsel. Too often, many of these plaintiffs are straw men acting on behalf of the lawyers who instructed them to buy the stock in order that they could file the suit, and they make a profession out of filing the suits.

This provision will encourage institutional investors to be the lead plaintiff, the people who have a real vested interest. After all, they have the most at stake in these lawsuits. Institutional investors have $9.5 billion in assets. They account for 51 percent of the equity market. Further, pension funds $4.5 trillion in assets.

These funds—mutual funds and pension funds—represent the holdings of millions of Americans, many of them small savers. They have every right to have fraudulent lawsuits brought fairly and correctly, not just because a certain lawyer jumped in front of him and got to the courthouse first.

Mr. President, the conference report will punish lawyers that file frivolous lawsuits. The bill requires a mandatory review by the court of whether a lawyer filed frivolous motions and pleadings, known as rule 11 under the Federal Rules of Civil Procedure. What could be the problem with this provision—enforcing the Rules of Civil Procedure?

The veto message was concerned with the pleadings standards, but a key part of this bill is stopping lawsuits that allege no specific wrongdoing but just generally allege fraud, just blanket fraud, because the stock price dropped. We have seen some pretty sharp stock price drops lately and not because anybody committed fraud. These kinds of suits get the plaintiff into court and then they can start demanding settlement.

The bill requires that an attorney in a private action must allege facts giving rise to a strong inference that the defendant had the required state of mind to make an untrue statement. At the very least, this provision requires that lawyers have more to go on than just generally alleging fraud.

The President's veto message also objected to the discovery process. To put it plainly, once a lawyer files a frivolous lawsuit, with little or no facts, he gets the ability to engage in discovery. This allows him or her to rifle through the records of a company looking for anything with any particular spin that smacks of fraud. He does not have to have anything when he starts. He gets it after he files his suit.

Mr. President, 80 percent of the cost of litigation is in the discovery process. This bill would stop the discovery process while a motion to dismiss is being deliberated. In other words, the court has to find that the complaint has merit before the company has to spend time and money responding to voluminous document requests.

This goes to the heart of this bill: File a lawsuit and then ask for the world in discovery and hope that the company settles the suit to avoid the cost of litigation. The lawyers take home a tidy sum of money for very little work. This is what we are trying to stop, and that is the blackmailing of corporate America.

Let me just say a word about the safe harbor provision. This is critically important to the flow of information for investors. Right now, companies are literally frightened to project their earnings, or anything else for that matter, because if they do and it happens to turn out wrong, then they are going to be sued for fraud. They cannot even give an honest projection of what they might make, because if it happens to be wrong, if a change in circumstances, events, business down, up, they are subject to fraud.

Big investors and small ones alike, mutual funds, pension funds, anybody that is investing needs this kind of information projection to make wise and prudent investment decisions. It is a shame that due to the actions of a small group of parasitic lawyers that the free flow of information has been muzzled, that you simply cannot find out what a company plans to do or can do.

Mr. President, another important reform that is being made by H.R. 1058 is reform of proportionate liability rules. This bill requires that those who are responsible for causing a loss pay their fair share of the loss but no more. If they cause 1 percent of the loss, they pay 1 percent. This is the way it should be.

Too many lawyers have gone after companies looking for the deep pockets, and this can be anybody that had anything to do with the operation of the company. It can be lawyers, accounting firms—anyone that was touched. So they are simply looking for the deep pockets. In many cases, a lawyer would not even bother to file the suit but for the deep pockets of the attorney firm or accountants, whoever might be involved.

Despite this provision, there are some circumstances when individuals will pay more than they really owe. For example, we have a so-called widows and orphans provision that imposes joint and several liability on everyone to cover the losses for persons with net worth below $200,000. In other words, it is protecting those people of less than $200,000, and everyone has to pony up to pay their claim.

Further, if a defendant is insolvent, other parties have to contribute another 50 percent of their liability to make up for the insolvent defendant.

On this particular point, the conference report goes a long way toward protecting small investors financially. They will not be left out in the cold if the principal target is insolvent. Small investors will be fully protected. Those who have a net worth over $200,000 will be fairly compensated.

Finally, anyone who knowingly commits fraud will be fully liable. There is no retreat from this. If they knowingly commit fraud, they are fully liable.

Mr. President, I am a strong supporter of securities litigation reform, and I am a supporter of overall legal reform. I hope this is just the beginning. Some have suggested that the indirect cost of all this litigation is $300 billion a year.

This is a heavy price for American business and industry to pay. It is a heavy tax on the American public for the rights of a few lawyers who engage in these frivolous strike suits.

Mr. President, the SEC has sent a letter to the committee in which they state that the conference report addresses their ''principal concern.''

Mr. President, the Washington Post called it a truly useful piece of legislation.

As I said earlier, this bill is too important to our economy not to override the President's veto. I urge the Senate to vote to override this veto. I simply feel that American industry and American business—particularly the high-technology businesses—have simply fallen victim to the piranha-type lawyer who goes after them whether there is any justification to his claim or not. But because of the cost of the lawsuit, he gleans a lot of money.

With that, I yield the floor.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER (Mr. GORTON). The Senator from Connecticut [Mr. DODD] is recognized.

Mr. DODD. Mr. President, this is a moment of some unease, obviously, for this particular Senator from Connecticut to be in a disagreement with my President on this issue. But I am going to be urging my colleagues to override the President's veto. I do so because I believe this bill, passed previously in this body and adopted again in a conference report, is a good bill and one that deserves support.

I appreciate the arguments raised by the President. I have had the privilege of discussing them with him and his staff over a number of months. And the President arrived at a different conclusion. I respect that.

Much has been made of the fact that I have a second hat that I wear from time to time, that is called the general chairmanship of the Democratic Party. I am very proud of that hat. As I said at the outset when I accepted that position, there would be times, I suspected, where my President, the leader of my party, and I would disagree on issues. This happens to be one of those moments. I hope there are not many, but it is one of those moments. So I regret that. Nevertheless, I feel that this is an important bill, one that I have spent a great deal of time on going back to 1991, when my colleagues—principally Senator DOMENICI of New Mexico—and others, began to work on this legislation in this body, and through a process of numerous hearings and the like, we arrived at the point we are at today.

I would like to take a few minutes, if I can, and discuss the matters of particular controversy at this moment and why I think that an override is appropriate.

First of all, I point out to my colleagues—and I think I heard my colleague from New Mexico make this point when he was addressing the Chamber earlier this morning—this is

truly a bipartisan bill, Mr. President. I realize that may not sound like much. It is certainly not a justification for supporting it. Unfortunately, there are fewer and fewer occasions when we have truly bipartisan bills like this. It is worthy of note because an awful lot of people on both sides of the aisle here have worked very hard to put this bill together. Is it a perfect bill? I suspect not. I have never seen one of those in my tenure here in Congress. Have we done everything exactly right? Probably not. Only time will tell where we have to make some corrections. But we have addressed some fundamental underlying problems that, by most people's comments, admittedly needed to be corrected. Those are the principal concerns.

I am grateful, in fact, that the President in his veto statement acknowledges that. We are no longer debating safe harbor, which was a matter of great controversy, or proportionate liability. We are no longer debating an issue my colleague from North Carolina pointed out a few moments ago, the right of the most injured plaintiffs to have at least the opportunity—it does not require it—but at least the opportunity to be the lead plaintiffs in the case, to require that in settlements or in judicial conclusions that the plaintiffs have an opportunity to get the award, and that the attorneys will take a second seat to the plaintiffs when it comes to divvying up the money that may come to them as a result of settlements, or a judicial award.

These are the principal matters in this piece of legislation. And the President, in his veto message, agrees with us on virtually all of them. In fact, in his comments—and I commend him for them—he has said this is a good bill. He has problems with two areas: pleadings and rule 11. I do not say they are unimportant, but certainly when you weigh them in the context of the overall bill, it amounts to just a handful of words—a fraction, if you will, of the overall achievement in the legislation.

So the bipartisan nature of this legislation, I think, is very, very important, and shortly I will discuss the specific concerns that I have mentioned, the pleadings area and the rule 11 area.

As I mentioned earlier, we have been debating this bill for going on more than 4 years now, into our third Congress on this legislation. Some 1,600 days have passed since the legislation was first introduced in 1991. There have been 12 public congressional hearings on this bill. That is an inordinately high number of congressional hearings on any single piece of legislation. Yet, that is how many have been held on this bill.

We have had 95 witnesses appear before congressional committees, representing all the different points of view, on securities litigation reform. We have had more than 4,000 pages of testimony, been a part of the legislative history that has led us to this bill that is now before us under these procedural circumstances.

There have been a half dozen staff and committee reports issued on the substance of the legislation, and, in fact, we have debated this piece of legislation for 7 full days over this past year here on the floor of the U.S. Senate.

Given this lengthy history, it is particularly disappointing that a veto of the bill has occurred, based on the issues that, frankly, have never previously been the subject of most of the contention and most of the debate. In fact, the President has stated his support, as I said earlier, for many of the most discussed and central issues, like the safe harbor provisions, proportionate liability provisions, the new lead plaintiff provisions, prohibitions on professional plaintiffs, and the discretionary bonding provisions. None of those issues should be the topic of our discussion today because, candidly, the President said he agrees with these issues.

What we are talking about are the issues he says he is in disagreement with. It is not an overstatement to say that his veto message indicates his support for about 95 percent of this legislation, and his veto is based on somewhere between 5 percent and 1 percent of the issues that are included in this bill.

In fact, when you boil it down, Mr. President, we are having a fight over 11 words—11 words out of over 11,000 words in the bill itself. Eleven words are the subject of the veto.

So the President vetoed this bill because of a relatively small percentage of the matters included in the legislation and apparently some wording in the statement of managers. It is somewhat rare that a veto would involve a statement of managers, but nonetheless, that was included in the veto message as well. So, Mr. President, I intend, obviously, no disrespect at all to the President, but this is the first veto I can recall where part of a veto message was based on a statement of managers.

As we discuss the issues upon which the President vetoed the conference report, it is important to remember some of the official statements that the administration has previously made, some of which directly contradict the veto message itself. Let me begin with the pleading standards, if I may.

Back in May of this year the Senate Banking Committee codified the essence of the pleading standards of the U.S. Second Circuit Court of Appeals. Then on June 23 of this year, S. 240, the bill before us moved to the floor. The administration, as administrations do, issued its statement of policy in which it praised the pleading standards ''as sensible and workable.'' That was the administration's statement of policy regarding the pleading standards in June of this year. The only difference between those pleading standards that were applauded in June and those endorsed by the administration, the ones before us today, are three words—the only difference between what was in the bill in June when the statement of policy came out and what is before you today are three words that have changed, and the words represent a technical change requested, by the way, by the Judicial Conference of the United States Federal Judiciary. These are not words we came up with. They were not words of the opponents or proponents, but they were altered at the recommendation of the Judicial Conference, in a letter from Judge Anthony Scirica to the committee staff when asked to give their comments on the pleading standards.

I know it has been included in the RECORD, but I ask unanimous consent that the letter dated October 31, 1995, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. COURT OF APPEALS,
THIRD CIRCUIT,
Philadelphia, PA, October 31, 1995.

Ms. LAURA UNGER,
Mr. ROBERT GIUFFRA,
Senate Committee on Banking, Housing and Urban Affairs, Dirksen Senate Office Building, Washington, DC.

DEAR LAURA AND BOB: I have a few suggestions for your consideration on the Rule 11 issue.

Page 24, line 11: Insert ''complaint'' before ''responsive pleading.''

Page 24, line 19: Insert ''substantial'' before ''failure.''

''Complaint'' would be added to item (i), so there is a clear provision that reaches any failure of the complaint to comply with Rule 11. A small offense would be met by mandatory attorney fees and expenses caused by the offense; if item (ii) is modified without this change, a gap is left in the statutory scheme. The result still is a big change from present Rule 11, which restricts an award of attorney fees to a sanction ''imposed on motion and warranted for effective deterrence.'' A serious offense—filing an unfounded action—would be reached under item (ii).

I also wish to confirm our prior conversation on scienter and the pleading requirement.

Page 31, line 5: Delete ''set forth all information'' and insert in its place ''state with particularity.''

Page 31, line 12: Delete ''specifically allege'' and insert in its place ''state with particularity.''

As I indicated, this would conform with the existing language in Rule 9(b) which provides that ''the circumstances constituting fraud or mistake shall be stated with particularity.''

Also, page 24, line 1: Delete ''entering'' and substitute ''making.''

Page 24, line 4: Delete ''of its finding.''

Many thanks.

Sincerely,

ANTHONY J. SCIRICA.

Mr. DODD. Mr. President, let me describe what the three words are so my colleagues know what we are talking about. The words that we had in the bill were ''specifically allege facts giving rise to a strong inference of fraud.'' That was the language we had—''specifically allege facts giving rise to a strong inference of fraud.'' What the Judicial Conference recommended was that we change that language to ''state with particularity facts giving rise to a

strong inference of fraud.'' So the change went from ''specifically allege'' to ''state with particularity.''

That is the change that occurred from the language that was applauded in June by the administration and in its statement of policy as to where it stood on the bill and what was adopted in the conference report. The change occurred without a great debate or a thunder and lightning storm or a conference in which the sides were in contentious argument. This recommendation of the Judicial Conference was accepted as something the conferees felt made sense.

So we did what the judges asked us to do, which is, I thought, how you normally proceed. You ask people who will be sitting on these matters to give us their recommendations—they are not Democrats, Republicans, named in a partisan debate—but merely their recommendations to the conference report.

Mr. SARBANES. Will the Senator yield?

Mr. DODD. If I could complete my whole comment because I want to get to the Specter amendment.

Mr. SARBANES. I was not clear what conference the Senator was referring to about thunder and lightning.

Mr. DODD. In the conference between the House and the Senate.

Mr. SARBANES. There was no legitimate conference. There were meetings of all the same-thinking types, and then a meeting of the conference committee was called to which everyone came, including people who had a different point of view, and the thing was simply railroaded through.

Obviously, there was not thunder and lightning and this so-called conference—there was no such conference.

Mr. DODD. If I may regain the floor, maybe my colleague was not at the same conference meeting I was, but I certainly recall a lot of thunder and lightning in the meeting about statements being made about what was in the bill.

Mr. SARBANES. But no discussion of substance. The true thinkers had worked all the substance out at other secret meetings before they ever came to the conference. The Senator knows that as well as I do.

Mr. DODD. If this were the decision of my colleague from Maryland to have vetoed this bill, he would have vetoed the bill, but he would not have vetoed the bill on the basis of pleadings. He would have vetoed the bill because he fundamentally disagrees with the legislation. I respect that.

But I was talking about the administration's position when it comes to the veto. The administration's position in June, when it came to the pleadings, was ''to support the pleading standards that were included in the bill'' that came out of the Banking Committee. When we went to conference there were no comments made by the administration that they disagreed at all with the change of language of ''specifically allege'' to ''state with particularity.''

That is the point in the veto message. I expect my colleagues have much more fundamental disagreements with the bill than the President, but we are talking about the Presidential veto.

The judges, I might point out, did not request out of thin air that the language be changed. The requested change in the language of the statute, we were told, was to conform with the language of rule 9(b) of the Federal Rules of Civil Procedure, which governs how attorneys should draft fraud complaints.

Mr. President, there is absolutely no substantive difference between the phrase ''specifically allege'' and the phrase ''state with particularity.'' The only difference, and the reason that the Federal judges wanted the change, is that ''particularity'' already has a meaning under law and ''specifically allege'' does not. Therefore, this change would produce a clearer, more consistent standard in the pleadings section of the legislation.

I also note, Mr. President, in April of this year the Chairman of the Securities and Exchange Commission, Arthur Levitt, urged the Banking Committee to adopt—and I quote from the testimony before the committee—''the second circuit pleading requirement that plaintiffs plead with particularity''—he said—''facts that give rise to strong inference of fraudulent intent by the defendant.''

I think it is particularly distressing, Mr. President, that the administration has reversed course on the pleading standards based on this technical change requested by the impartial Judicial Conference of the United States.

A final note, if I can, regarding this particular section, on the legislative history to which the White House has objected. The White House has endorsed the pleading standards for the same language in the Banking Committee report on S. 240. Neither bill codifies the entire case law of the second circuit, as the administration says it wishes it did, and that is one of the reasons it has expressed its objection. The White House has also raised the issue of the Specter amendment, which was added to S. 240 several days after the administration endorsed the pleading standards in the bill that came to the floor of the U.S. Senate.

Now, our good friend from Pennsylvania, I gather, has already addressed this issue on the floor of the Senate earlier today and, of course, at the time he offered the amendment and at the time we adopted the conference report. As he claimed, his amendment would codify guidance on how plaintiffs who establish the strong inference of fraud. The difference was not over the issues of ''state with particularity'' or ''specifically allege'' wording, but rather, how do you establish the strong inference of fraud?

Unfortunately, because the Specter amendment failed to include key guidance from the second circuit, it would have had the effect of totally undermining the pleading standards that we were seeking to establish and that have been supported by both the Securities and Exchange Commission and the White House in its earlier statements.

Let me go into this, if I may. First, I want to read to my colleagues, if I can, a memorandum sent to the President of the United States from Prof. Joseph Grundfest of the Stanford Law School and previously a Commissioner with the Securities and Exchange Commission, on the subject of pleadings standards and pending securities reform legislation. He is one of the most knowledgeable people in this particular area:

The pleading standard articulated by the Second Circuit Court of Appeals is intended simply to require the plaintiff to allege facts sufficient to give rise to a strong inference of *motive* to defraud. Plaintiffs must do more than make bald assertions as to motive, but are not required to develop the entire case in the pleadings. While this standard differs from the standard applied in some more lenient circuits, particularly the Ninth Circuit, it has not resulted in over-deterrence in the Second Circuit or in excessive dismissals. Indeed, the Second Circuit remains one of the most active in the country for 10b–5 claims.

As I read the securities litigation conference report, the pleading standard is faithful to the Second Circuit's test. Indeed, I concur with the decision to eliminate the Specter amendment language, which was an incomplete and inaccurate codification of case law in the circuit.

As is stated in a recent Harvard Law Review article, codification of a uniform pleading standard in 10b–5 cases would eliminate the current confusion among circuits. The Second Circuit standard is among the most thoroughly tested, and it also balances deterrence of unjustified claims with the need to retain a strong private right of action. Indeed, the Second Circuit is widely respected for its legal sophistication and acumen in matters relating to securities and business litigation. The fact that the Second Circuit evolved the strong inference standard is therefore worthy of particular deference and respect.

In short, I support the pleading provision of the conference report.

Mr. President, I ask unanimous consent the memorandum from Professor Grundfest at Standford Law School be printed in the RECORD at this point.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

MEMORANDUM

To: President Clinton, Through Elena Kagan, Office of the White House Counsel.

From: Professor Joseph A Grundfest, Stanford Law School, Commissioner, Securities and Exchange Commission, 1985–1990.

Subject: Pleading Standard in Pending Securities Reform Legislation.

Date: December 19, 1995.

The pleading standard articulated by the Second Circuit Court of Appeals is intended simply to require the plaintiff to allege facts sufficient to give rise to a strong inference of *motive* to defraud. Plaintiffs must do more than make bald assertions as to motive, but are not required to develop the entire case in the pleadings. While this standard differs from the standard applied in some more lenient circuits, particularly the Ninth Circuit, it has not resulted in over-deterrence in

the Second Circuit or in excessive dismissals. Indeed, the Second Circuit remains one of the most active in the country for 10b–5 claims.

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In short, I support the pleading provision of the conference report.

Mr. DODD. Mr. President, our colleague from Pennsylvania, when he offered his amendment on the floor of the Senate, said that what he wanted to do was to take the guidance from the second circuit and codify that as well.

With all due respect to my colleague from Pennsylvania, the language of his amendment did not really cover all of the guidance. His amendment stated that ''strong inference of fraudulent intent for purposes of paragraph 1, a strong inference that the defendant acted with the required state of mind, may be required, either, A, by alleging facts to show that the defendant had both motive and opportunity to commit fraud or, B, by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.''

What is my problem with that? The problem with it is that is not the guidance. He omits what Judge Newman has included as his guidance, and the guidance that was not included in the amendment says, for part B, ''where motive is not apparent.'' Where motive is apparent, you do not have to make any allegations of a lot of circumstances. If you have a clear motive, you do not have to worry about the circumstances or the alleged strong facts. Where you do not have motive, apparently, and that can be a case where it is hard to get at that motive, then you are going to allege circumstances. There Judge Newman says, ''Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.'' Greater. The Specter amendment did not distinguish at all between the circumstances in part A or part B of his amendment, and therefore did not really follow the guidance of the second circuit. So that is the reason that amendment was taken out.

You could have gone in, I suppose, and said why did you not include the other language here? The problem was, in a sense, by codifying guidance you get into an area where you can get some differences of opinion on this. And arguably it could have, I suppose, gone back and included all of it, but the decision was to take it out on the assumption that courts will look to the guidance.

We have established the standard clearly. We have clearly established the standard of alleging facts with particularity, showing a strong inference of motive. Then the guidance of the court would be followed.

But the suggestion that the standard and—the guidance, rather, was included in the Specter amendment, omits—omits that where a motive is not apparent, the strength of circumstantial allegations must be correspondingly greater. That was omitted. And that is the reason that, with all due respect to the administration, they are, I think, hanging their hat on the wrong issue here.

We have met the second circuit standard here, as indicated by the memorandum from Judge Grundfest, Professor Grundfest at Stanford. We have met that standard. We have left out the guidance. That does not mean you disregard it. But if you are going to follow the guidance, as Senator SPECTER suggested, then the guidance must include, in part B, that you have circumstantial allegations that are correspondingly greater than they would be if the motive was apparent.

So that is the first issue and frankly it is a marginal issue, I would say. It has some importance. I do not disregard it. But to suggest somehow this bill ought to be vetoed over that, I think is not correct.

I am not going to dwell at length on the rule 11 issues, except to make the following applications. The intent and application of the rule 11 provisions of the conference report are identical to the rule 11 provisions from S. 240 that the administration states in the veto message that it now has difficulty with. In fact, the only difference in the configuration of this provision in S. 240 is the Senate adopted a sanction for rule 11 that allowed a victim of a violation to collect the legal fees and costs incurred as a direct result of the violation. The conference report simply makes clear that it was our intent, that a substantial violation, a substantial violation in the initial complaint could trigger sanctions that included all attorney's fees and costs for the entire action.

That was our intent anyway. If you file a complaint that does not meet—that would fall under rule 11, and I will not read all four areas where a motion or a complaint would be deficient in terms of rule 11—but, if you have initiated a complaint and at the end of the action the judge goes back and says that complaint that you brought—and these have to be substantial violations—did not meet that standard, it is logical that it would have to apply to the entire proceeding.

If you brought a frivolous lawsuit, initiated a frivolous lawsuit, then all of the costs come thereafter.

You do not apply that same standard with motions, obviously, assuming the complaint does not violate rule 11. But if a defense lawyer brings a motion that is frivolous, then the costs associated with that, obviously would have to be borne by the defense lawyers as well, regarding that motion. So, logic would indicate that there is a difference here.

Mr. SARBANES. Will the Senator yield?

Mr. DODD. I will be glad to yield.

Mr. SARBANES. The defense would not be held liable for all the costs? Plaintiff would but not the defense?

Mr. DODD. Yes, they would be. My point was this: if—Let us assume for a second that the initial complaint is a frivolous complaint. The initiation of the action, what begins it, violates rule 11, is a substantial violation of rule 11, and then at the end of that case the judge finds that there was a substantial violation of that, then the costs associated with that entire case, because the initiation of the action was wrong.

Whereas, if a defense lawyer, in the process of handling the case, files a motion that violates rule 11, then the costs associated with that motion, as I understand it, would then be borne by the defense counsel incurring plaintiff's attorney's fees.

Mr. SARBANES. If the Senator will yield, I find that an absolutely staggering assertion, saying that you should have this disparity in treatment between plaintiff and the defense.

The Senate-passed bill contained a presumption that the appropriate sanction was an award of reasonable attorney's fees and other expenses incurred as a direct result of the violation, and it applied that to both plaintiff and the defendant, as the bill went out of the Senate.

The conference changed that. So they imposed a much more onerous burden upon plaintiff as compared with the defendant. There is no basis in logic or reason to do that.

Mr. DODD. Oh, absolutely there is. Absolutely there is.

The costs associated are a direct result of the complaint. If you have initiated the complaint here, and all the costs then come after, that is the action that initiated the activity, it seems to me. That is the reason. That was certainly—for those of us who were working on it, that was the intent. At any rate, that is why. And then of course thereafter there is a balance.

But there is a distinction, obviously. If you start an action and you violate rule 11 here—and for the sake of discussion you have brought an action which, to pick out in the first instance here, let us say No. 1, under rule 11, ''under circumstance that is not being presented for any improper purpose such as to harass or cause unnecessary delay or needless increased costs''—let us say ''to harass.'' You violated paragraph 1

of rule 11. The sole purpose of your lawsuit was to harass. That is what you would have to be found guilty of. So you filed a complaint for sole purpose to harass a defendant. That is the reason you brought the action. If the court finds in fact that was the reason, I think the attorney who brought the action not for good cause but solely to harass a defendant, and incurred costs thereafter that the defendant had to pay to defend an action brought solely to harass the defendant—yes, I do think that attorney should have to pay the cost of that entire case, if the sole purpose was to harass the defendant.

Mr. SARBANES. That would be the direct result of a violation under the language of the Senate-passed bill. In the conference, they changed this language.

Mr. DODD. No. I do not know.

Mr. SARBANES. They changed it in such a way that you get a disparate treatment of the plaintiff and the defendant. There is no basis to do that.

Mr. DODD. Let me finish my thought, if I can. Let me tell you what the change is.

Mr. SARBANES. I apologize to the Senator.

Mr. DODD. Nevertheless, Mr. President, we also provided some protections for plaintiffs, a presumptive sanction for initiating illegal litigation. It is not triggered unless the complaint substantially violates rule 11. So we added that part to it. There are plaintiffs who violate rule 11. Only plaintiffs file complaints, obviously, and so plaintiffs get the benefit of this heightened rule 11 threshold. Plaintiffs face sanctions only if they committed, as I said, a substantial violation.

So my point here again is that that was certainly our intent to begin with. Again, I have stated earlier, I do not like the idea—my colleagues may recall, and I see my friend from New Mexico is on the floor here—that initially you had proposals that would have said, ''Well, if you lose the case, you pay.'' That is the British rule.

I stated on this floor that I would vehemently oppose this legislation if we had a ''loser pays'' provision. A person could have a good case and lose the case. I would vehemently oppose any legislation that would have such a chilling effect. A plaintiff who thinks they have a good case—who thinks they have been harmed and injured because of a defendant's actions—and loses the case, we should make that defendant pay the cost to the plaintiff.

That is a very different situation from a violation of rule 11, where the action or the complaint is frivolous, or instances in which the plaintiff is out to harass defendants. In that case, frankly, I think the attorney should pay. I think that is the best weapon we have here to discourage these frivolous lawsuits. You had better think twice. If you are just going to file these things, make wild accusations not based on fact, and in some cases just designed to harass people, by God you ought to be asked to pay. And that is what people are angry about in this country because that is what has happened too often. Unfortunately, it is not usually the named defendants who pay. It is the people that insure—the insurance companies—the people who work in these places who end up paying. It usually is not the big guys at the top. It is other people who work in these facilities, people who invest in them, or others who end up paying the bill. When that happens, there ought to be a cost associated with it. Remember, it has to be a substantial violation in those particular matters.

Mr. President, let me also make abundantly clear that in making this change, as I said earlier, we imposed a higher burden of proof in violation of the complaint by a requirement of substantial. The entire intent of the legislation is to deter frivolous litigation from the beginning.

As I said a moment ago, why should there not be some significant sanction for initiating an action that violates the standards of the Federal Rules of Civil Procedure? Why have rule 11? Maybe we should have struck rule 11 entirely. If you are going to have rule 11 that says if you harass people or bring frivolous lawsuits, rule 11 has existed for decades. The problem is, it has only been a piece of paper. It has hardly ever been invoked at all. It has never been a threat to anybody. Maybe we should have gotten rid of it altogether. Maybe we should have done that to satisfy some people. If you are going to have it, make sure it means something. If you harass or bring a suit without any basis in fact, think twice about it. If there is no economic penalty to it, I do not know how to clean up the mess these frivolous suits have created. That is why it is included.

Those are more protections, by the way. As I said earlier, we should not forget that the conference report also gives the judge in these cases broad discretion to waive the sanction against the violating party if the judge finds that the violation was de minimis or it would be an unjust burden for the violator to pay the sanctions. Some might argue that we should not have included that. But, nevertheless, it is in there to have the judge find it is an unjust burden. We are not going to ask you to pay. You have to violate rule 11. There has to be finding that you have violated this rule of bringing frivolous lawsuits—not that you lost or won the case, but that you violated rule 11.

As I said, those are more protections for plaintiffs than currently exist in rule 11, which give no discretionary power to a judge to waive the sanctions when he or she finds a violation of rule 11. Under present law, if a judge found a violation of rule 11, then he or she has to impose the sanctions. We provide some protection here for these plaintiffs' attorneys if in fact the judge does find that they have violated—a substantial violation.

Mr. President, I am sure there will be ample opportunity to debate some of these highly technical matters. I hope we would get to a vote on this. I do not enjoy belaboring this issue. We spent days on this bill.

Let me say again that there are a number of my colleagues who fundamentally disagree with this bill. I respect that. I disagree with them, but I understand their objections. But I have to repeat: I do not understand having been through this process now.

I was asked months ago—my colleagues ought to know this—to address some concerns that the administration had with the bill, particularly with safe harbor. There were a couple of other areas the administration had problems with—aiding and abetting and the statute of limitations. I offered the amendment on the statute of limitations to give a longer period of time. I lost that in committee, and I lost it here on the floor.

In the aiding abetting provisions, we provided half a loaf here by allowing the SEC to deal with the class actions. We did not go as far as some would like, even I would like. But it was a major point of contention for the administration. In conversation after conversation after conversation, it was safe harbor—fix safe harbor, Senator. Get that safe harbor straightened out.

I cannot tell you the hours spent on the safe harbor issue because I wanted the President to sign this bill. I kept on telling them that if we did fix safe harbor, I felt confident that the bill would be signed. We worked for days on this, and ended up with language that was supported by the Securities and Exchange Commission. It met their concerns. In fact, the President in his veto message applauded us for having done it. He supports the safe harbor provision. And then I find out after the conference report is voted on that all of a sudden there are a couple of issues—not issues that are not of concern to my colleagues on the floor who object to the bill. I understand that. But I must say to my colleagues, the issue of pleadings and rule 11 was never a major issue, not to the administration. I was never asked by the administration to address the pleadings or the rule 11 issue. The only thing I was asked to address was safe harbor, aiding, abetting, and the statute of limitations. And on those two, there was an appreciation that we had done the best we could. But you do not veto a bill for what is not in the legislation.

I do not disagree that my colleagues here have difficulty with the pleadings in rule 11, but we are talking about a veto here today and the veto message. The veto message was on pleadings and rule 11 and some language in the statement of managers. That is a very small percentage of this bill. It is 11 words out of 11,800 words in this bill—11 words. After 4 years, 12 congressional hearings, 100 witnesses, 5,000 pages of testimony, we are down here about to lose that kind of an effort over 11 words.

Mr. President, we did not write the Ten Commandants here. This is not

etched in marble. I said this to my colleagues elsewhere. I have been mystified. Nobody would stand up with a bill and say that we have offered you the perfect piece of legislation. I cannot say that. I think we have done a good job here in both Chambers of the Congress, the House and the Senate, with Democrats and Republicans, and with 4 years of effort. We have put together a good bill, and in my view we have done it the way a bill ought to be adopted. Do we know it is perfect? No, we do not. If something comes up a year or two from now where there is a problem, you fix it.

We have had this problem of frivolous law suits for years, and we are trying to fix it. We may lose the opportunity to do that because of some people's concerns about things that I think, frankly, should not be matters of concern, but if they turn out to be, we can correct them. But you do not squander the opportunity to change a situation so fundamentally awry it screams out for solution.

Today, with great regret, with great regret, I urge my colleagues to override this veto and to adopt this legislation by that action, and let us get on with the business of other matters that are before this body.

With that, Mr. President, I yield the floor.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, I observe for my colleague from Connecticut that the two words ''I do''—it is only two words—but they have tremendous, far-reaching significance. So the fact that there are only 11 words, you know, if they are critical 11 words they can make a tremendous difference, and in the lives of people there are the two words ''I do.'' They can make an enormous difference in our lives.

Mr. DODD. If my colleague will yield, I will not disagree on that, having said ''I do'' on occasion. Some of our colleagues have said ''I do'' on many occasions. But I appreciate the significance of what he is saying. I am merely trying to put it into balance.

Mr. SARBANES. If there are only 11 words, why do you not take this bill and rewrite it and meet the objections?

It is interesting. I find it very interesting that this is being treated as though Congress were about to end. The fact of the matter is that there is an opportunity to address these problems, eliminate them. Actually, I am not going to go at great length here because I understand the distinguished Senator from Minnesota wishes to speak.

I can address this problem later, but I am going to quote from some of these leading law professors in the country about the problems they see in this legislation. Now, I just want to make a couple of points here though because we were trying to have an exchange and I wish to register them at this point in the RECORD.

It is interesting; there is a lot in this legislation that those of us who have opposed its support. We do not disagree with trying to fashion legislation to deal with the problem of frivolous lawsuits, and there is much in this legislation that we would support. There are other things that are not in it that we think ought to be in it, which we have debated, and there are things in it which we think ought not to be in it, which is the focus obviously of the current attention.

Mr. DOMENICI. Could I ask the Senator one question?

Mr. SARBANES. I yield to the Senator for a question.

Mr. DOMENICI. I listened to the Senator's remarks to my friend, Senator DODD, when we talked about 11 words.

Why does the Senator not draft a bill with those 11 words. It ought to be easy to pass an 11-word bill.

Mr. SARBANES. I am not sure it will be because—first of all, I do not know that it is only 11 words that are at issue, and I do not think that is correct. But, in any event, those provisions were not included in this legislation and were resisted very strongly by those, whoever brought the measure to the floor, and yet they have a significant impact on what the effect of this legislation will be.

Mr. DOMENICI. I mean, would it not be a pretty good debate on 11 words? The Senator could get that to our committee, and we could debate the 11 words instead of killing the bill.

Mr. SARBANES. Well, the President sent the veto here, and the issue is whether to sustain the veto. I think we should sustain the veto.

Mr. DOMENICI. I thank the Senator.

Mr. SARBANES. Yes, indeed.

Now, let me address a couple of other things. The Senator from Connecticut spoke about the thunder and lightning at the conference on this legislation. And I say to the Senator, I was a member of the conference committee. I only remember it meeting once. Am I erroneous in that remembrance?

Mr. DODD. Far be it for the Senator from Connecticut to challenge the Senator's remembrances. I do not know if the Senator is erroneous or not in his remembrance. I do not know how many actual meetings occurred. There were a lot of conferences.

Mr. SARBANES. Of the conference committee.

Mr. DODD. I would suggest this is not a unique event. It is common to have back and forth, and so forth, at meetings. Rather than having Members sit, staff does this. I know the Senator from Maryland, having chaired committees and conferences, knows it is not uncommon in these meetings to have staffs work back and forth to try to resolve matters without Members sitting there. It is not unique. Is that a unique occurrence?

Mr. SARBANES. I say to my colleague from Connecticut, the procedure here that was unusual and somewhat unique, although it is becoming more frequent—I regret to say in the workings of this Congress, it is becoming more frequent—was that all the true believers gathered together to try to work out the House and Senate differences but did not include in those discussions the people who were on the other side.

Now, that is not a good way to legislate, in my opinion, because sometimes by having the people on the other side, you have a dialog and a discussion, and you are able to work out measures and improve them.

Now, what happened here, that never took place. What finally took place that encompassed everybody including those who were critical of this legislation was the final meeting where they simply railroaded through what the conference agreement was, and it is the conference agreement that has provoked the President's veto in this instance. The President, in fact, has indicated that if he had been given a bill as it had passed the Senate, he would have signed it, as I understand it. So it is conference action that did it, and the conference action was taken by all, any meaningful action on the substance was taken simply by those on one side of issue.

Mr. DODD. If my colleague will yield further——

Mr. SARBANES. Certainly.

Mr. DODD. The bill that is before us, except for a couple of provisions, some of which we would argue improve the bill, is virtually what the Senate adopted. This is not a bill that even remotely looks like the House-passed bill. In fact, it is the Senate-passed bill. I know my colleague from Maryland was opposed to even the Senate-passed bill. But in terms of from the administration's standpoint, again I point out that in June on the pleading standards and the statement of policy from the administration, they endorsed what came out of the Senate bill. And regarding the rule 11——

Mr. SARBANES. If the Senator will yield on that very point, it was changed then in the conference. The fact that the administration——

Mr. DODD. The only thing that was changed, the only thing that was changed was at the recommendation of the Judicial Conference, and it was regarding the words ''effectively allege'' or ''state with particularity.'' Those words were recommended by the Judicial Conference.

Mr. SARBANES. No, two other things were done. In the conference, they removed the Specter amendment that had been adopted in the Senate that carried with it further elaborations, carried with it further elaborations by the second circuit with respect to the pleading standard, and second—and this is something the President focused on in his veto message—the statement of managers about the pleading standard in effect sought to put a legislative interpretation spin on it which raised the standard even higher, and some of the law school deans

who have written in about this matter have focused on that very fact.

In other words, what you did is you changed the standard as it passed the Senate to make it more difficult and then the statement of managers put a further spin on it.

Mr. DODD. If my colleague will yield, let me go back. I tried to do this earlier. The Specter amendment said he was codifying the guidance in the second circuit, and that is not the case. That is where the problem occurred here.

Mr. SARBANES. I listened to the Senator's comments on that subject, and the distinguished Senator from Pennsylvania will have to speak for himself, but even assuming the accuracy of what the Senator stated—and I am not in a position to do that. The Senator from Pennsylvania, I am sure, will be able to do so. Assuming the accuracy, then the way to have corrected it would have embraced all the guidance, not to eliminate that guidance, which was designed to provide some additional protection for the investors as the second circuit elaborated their standard.

Mr. DODD. If my colleague will yield further—I appreciate him yielding—you can make that case.

Mr. SARBANES. Yes, you can.

Mr. DODD. I understand that. But the suggestion that somehow the courts are going to disregard the guidance because it is no longer in the bill itself, it has not been codified, I think overstates the case, when you come down to vetoing this whole bill on that particular question. My point simply has been that I do not think the Specter amendment was—I think it was an effort to get recklessness in, which would have changed the standard from the second circuit. Nonetheless, putting that aside, the guidance is still going to be there. The guidance would still be there. And you do not veto the whole bill over the issue of guidance.

Mr. SARBANES. If the Senator will yield, you not only took the guidance out of the statute from the second circuit but you sought to give the courts a different guidance contained in the statement of managers in the conference report. So you committed, as it were, a double violation. You took out the guidance of the second circuit. Then you say, well, if it is not there, the courts will look to the guidance in any event. Ah, but what you did is you then interjected in as guidance with respect to this provision a statement of managers.

Mr. DODD. First of all, Mr. President, I say to my colleague, it was the guidance of the second circuit, No. 1. And by taking it out, the statement of managers is—again, one I have never heard. Maybe my colleague can cite examples where there is some confusion over what was intended there, but you do not veto a whole bill over the statement of managers.

Mr. SARBANES. Well, this bill with respect to the statement of managers is obviously an effort to in part rewrite the bill at that level of consideration.

Now, Mr. President, let me make one other point while my colleague is still here. My colleague made a lot about the number of hearings that were held, but I have to submit to you that those hearings were in a sense ignored.

My distinguished friend from Connecticut earlier stated that with respect to one provision—I think it was on safe harbor. He quoted Arthur Levitt, the Chairman of the Securities and Exchange Commission. But let me just show you how these hearings are ignored. And so the fact that you have a lot of hearings may make no difference at all.

On May 12, 1994, the Securities Subcommittee held a hearing, which the distinguished Senator from Connecticut chaired.

The Senator himself stated at that hearing:

> Aiding and abetting liability has been critically important in deterring individuals from assisting possible fraudulent acts by others.

That is my colleague from Connecticut speaking at this hearing. Testifying at that hearing, Chairman Levitt, whom he cited earlier for another provision in terms of supporting it, stressed the importance of restoring aiding and abetting liability for private investors.

> Persons who knowingly or recklessly assist in the perpetration of a fraud may be insulated from liability to private parties if they act behind the scenes and do not themselves make statements directly or indirectly that are relied upon by investors. Because this is conduct that should be deterred, Congress should enact legislation to restore aiding and abetting liability in private actions.

And the North American Securities Administrators Association, the Association of the Bar of the City of New York, also endorse restoration of aiding and abetting liability in private actions.

So what good does the hearing do us? We have the hearing. This is what the testimony is. The distinguished Senator himself, in a sense, led off that hearing by underscoring the importance of aiding and abetting liability. And it ends up not being in the legislation.

So you can have all the hearings you want. It does not necessarily demonstrate that an appropriate and reasonable piece of legislation has been crafted.

Mr. DODD. If my colleague would yield on that, as I said earlier, he may have missed my statement. He may want to bring up the statute of limitations issues as well. It is not in the bill. I offered the amendment on that particular instance to include the legislation, as my colleague well knows.

Mr. SARBANES. That is accurate. And I commend the Senator for doing that.

Mr. DODD. As the saying goes, you make the perfect the enemy of the good. We are a body of 100 Members here. There is not the political will to do what the Senator from Maryland and I would like to do on aiding and abetting. But let us consider what happens if the President prevails today and the veto is sustained.

What happens to the statute of limitations and aiding and abetting? Obviously the statute of limitation does not change. The Supreme Court has ruled on it, so there is no difference. It is not affected by this. But on aiding and abetting we have made a substantial gain in aiding and abetting by restoring to the Securities and Exchange Commission the right to bring class actions. Without this legislation you even lose that aiding and abetting.

So I regret deeply we do not have aiding and abetting here. The majority of our colleagues have rejected that. But the suggestion that I ought to lose everything else I have achieved because I was not able to get a statute like the statute of limitations or aiding and abetting is not a reason to be against the bill.

I hope we can convince a number of people in the next couple months, in a separate bill, to expand the aiding and abetting and the statute of limitations. But I cannot see why I should be opposed to the whole bill here, when on portion of liability, on safe harbor, on lead plaintiffs and on aiding and abetting, where we do get half a loaf at least, that the SEC wanted, and I am confident my colleague from Maryland wanted, and I wanted, that we would not have been able to get that without this piece of legislation. I thank my colleague for yielding.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland has the floor.

Mr. SARBANES. Mr. President, let me just close out by including in the RECORD a letter from the ABA, from the President of the American Bar Association, to President Clinton opposing key provisions of the legislation, H.R. 1058, and urging the President to veto the legislation.

Let me just quote it very briefly:

> The ABA continues to believe that this proposed legislation can and should be corrected by the Congress to correct the significant difficulties that it would cause in its current state. We agree that underlying problems in the area of securities litigation must be addressed, but that must happen without unduly barring access to the courts to parties who are defrauded.

And then they enumerate the most objectionable parts of H.R. 1058, including the rule 11 changes about which my colleague from Connecticut has discussed, and particularly underscoring the fact that the provision now lacks balance in that it treats plaintiffs more harshly than defendants.

They also discuss the pleadings rules about which he has spoken, and in effect point out the difficulty it would present to people in having their cases heard, in other words, the danger that meritorious cases will be dismissed at the pleadings stage. It goes on to make other criticisms as well.

Mr. President, later I intend to address these comments that we have received from some of our Nation's leading legal scholars——

The PRESIDING OFFICER. Is the Senator from Maryland going to make a unanimous-consent request?

Mr. SARBANES. Mr. President, I ask unanimous consent that the letter be printed in the RECORD at the end of my remarks that have been made with respect to the provisions that are before us, letters to the President urging the veto of the bill, which the President made.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

EXHIBIT 1

AMERICAN BAR ASSOCIATION,
Albuquerque, NM, December 17, 1995.

President WILLIAM JEFFERSON CLINTON,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I write on behalf of the American Bar Association. The ABA opposes key provisions of legislation presently before you entitled Reform of Private Securities Litigation, H.R. 1058. I strongly urge you to veto the legislation.

The ABA continues to believe that this proposed legislation can and should be corrected by the Congress to correct the significant difficulties that it would cause in its current state. We agree that underlying problems in the area of securities litigation must be addressed, but that must happen without unduly barring access to the courts to parties who are defrauded. The most objectionable parts of H.R. 1058 include the following:

1. ''Loser Pays'' or Rule 11 Changes.—The ABA opposes any requirement that would impose responsibility on a non-prevailing party for the legal fees of the prevailing party in securities actions. H.R. 1058 contains such a ''loser pays'' provision and would materially change Federal Rule 11, it is called a mandatory sanctions rule. That provision's call for mandatory sanctions in the form of attorneys fees and its lack of balance, treating plaintiffs more harshly than defendants, are unacceptable.

2. Other Mandated Changes in Federal Rules for Securities Cases.—H.R. 1058 significantly amends Rule 9(b) on pleadings and Rule 23 on class actions. These because for the first time under the Federal Rules, they would establish special requirements for a particular class of cases.

Moreover, the proposals contradict the present Rule 9(b) of the Federal Rules of Civil Procedure. In light of the evidence that courts today already enforce heightened pleading requirements. Federal laws should not endorse the dismissal of meritorious cases at the pleading stage. The pleading standards in H.R. 1058 require a plaintiff to plead the ''state of mind'' of each defendant, something utterly impossible to do prior to discovery.

The ABA further opposes the proposed limitations on the ability of plaintiffs to amend their pleadings and to pursue discovery. Such limitations while undoubtedly preventing frivolous claims from going forward, would also bar claims with substantial merit. Only through significant discovery and repleading do these important claims get adjudicated; H.R. 1058 would subvert that process.

The ABA supports the process called for in the Rules Enabling Act. No amendments to the federal rules should ever occur except after the deliberative process of the Rules Enabling Act has been followed. H.R. 1058 wreaks havoc with that principle and violates the important principle that the Federal Rules of Civil Procedure apply uniformly to all causes of action.

3. Immunization of Intentional and Reckless Conduct.—The ABA House of Delegates adopted policy at its last meeting in February that opposed any legislation that eliminates the concept of recklessness from that which is required to be pled or proved in private actions under Rule 10 b-5. H.R. 1058 will compromise the principle that those who engage in reckless conduct, to say nothing of intentional conduct, should be held responsible under the federal securities acts. The ABA opposes this legislation's grant of a safe harbor to both intentional and recklessly issued misleading and false statements.

4. Choice of Class Plaintiff and Joint and Several Liability.—H.R. 1058 specifies that a wealth qualification directs both the choice of class plaintiff provision and the operation of the joint and several liability section. In one case, you have to be rich enough to be named the class representative and, in the other case, you have to be poor enough to receive the benefits of joint and several liability for reckless conduct. The ABA believes this provision of H.R. 1058 would bar access to the courts to shareholders with small holdings.

On behalf of the American Bar Association, I urge you to veto H.R. 1058. A veto would motivate Congress to make changes needed so that the many laudable provisions of the legislation may quickly become law.

Respectfully,

ROBERTA COOPER RAMO.

Mr. SARBANES. Mr. President, I yield the floor.

Mr. CHAFEE addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, I know the Senator from Minnesota is next. And my question to the Chair is, whether—I ask unanimous consent that I might follow the Senator from Minnesota when he has completed, and speak as in morning business for 10 minutes.

Mr. REID addressed the Chair.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Mr. President, I reserve the right to object. If I can enter a colloquy through the Chair to my friend from Rhode Island, there are a number of us that have been wandering around here for several hours this afternoon. I am wondering if we might find out how long people want to speak before we go into this situation where we give the floor——

Mr. CHAFEE. I did not know the Senator was——

Mr. REID. Senator PELL is here.

Mr. PELL. I would like 2 minutes.

Mr. CHAFEE. How long might people be?

Mr. REID. It would be 2 minutes for the senior Senator from Rhode Island. And the junior Senator from Nevada——

Mr. CHAFEE. I will follow the Senator from Nevada.

Mr. REID. How long is the Senator going to be?

Mr. CHAFEE. Senator BREAUX and I were going to have a little colloquy for 10, 15 minutes, so we would just as soon follow the Senator from Nevada.

Mr. REID. Then if we could—so people know that are watching—if the Senator from Minnesota would speak, the senior Senator from Rhode Island, and then the Senator from Nevada.

Mr. President, I ask that the unanimous-consent request be amended, that following that there be the time allotted to the Senator from Rhode Island and the Senator from Louisiana.

The PRESIDING OFFICER. Is that request in the form of a unanimous-consent?

Mr. REID. It is.

Mr. SARBANES. Reserving the right to object, how long does the Senator from Minnesota intend to speak?

Mr. GRAMS. About 10 minutes. I would defer to the Senator from Rhode Island making a statement dealing with this pending business ahead of my statement.

Mr. PELL. I thank my colleague.

Mr. CHAFEE. Which Senator from Rhode Island?

Mr. GRAMS. The senior Senator.

Mr. REID. I ask unanimous consent the request be amended as reflected by the Senator from Minnesota.

The PRESIDING OFFICER. Is there objection?

Mr. CHAFEE. Could I ask a question?

The Senator from Nevada, how long does he think he might be?

Mr. REID. About 20 minutes.

Mr. CHAFEE. I thank the Senator.

The PRESIDING OFFICER. Without objection, it is so ordered. Under the unanimous-consent agreement, the senior Senator from Rhode Island is recognized.

Mr. PELL. I thank the Chair.

Mr. President, today the Senate is considering overriding President Clinton's veto of the securities litigation reform bill. After careful reflection, I have decided to continue my long history of support for this legislation.

In doing so, I wish to point out that I do not do so lightly. I admire and honor our President immensely and have always respected the prerogative of our President in his use of the veto power and especially so when this power is responsibly and sparingly used, as has been the case with President Clinton. I do believe the President has acted upon personal principle with regard to this bill and that his decision was arrived at in a thoughtful and deliberate manner. Nevertheless, I respectfully disagree and believe that this particular bill should become law.

I have been a longtime supporter of legal reform, especially measures which seek to reduce the excess and frivolous litigation so prevalent in our society. On this measure, I was one of the first Democrats to join as a cosponsor some 4 years ago and have been active in promoting it ever since. As with any piece of legislation, the final product is one of compromise and, indeed, does not contain every provision that I would like. Nevertheless, it is a good, carefully considered, bipartisan effort

at addressing the very real and growing problems associated with excessive and frivolous lawsuits besieging publicly held companies. As such, this bill deserves to be implemented into law.

I do regret being in the opposition in this matter but as a longtime advocate for this legislation, I believe that this bill is both responsible and necessary to address the need for litigation reform with regard to our securities industry.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Chair now recognizes the Senator from Minnesota.

Mr. GRAMS. Mr. President, I want to thank the Chair very much, and I ask unanimous consent that I be allowed to speak as in morning business for up to 10 minutes.

The PRESIDING OFFICER (Mr. ABRAHAM). Without objection, it is so ordered.

A WONDERFUL LIFE . . . OR JUST ANOTHER NIGHTMARE?

Mr. GRAMS. Mr. President, I know this is a very important debate that is going on dealing with securities litigation, but there is also an important debate going on today and has been going on for months, and that is dealing with the budget.

The string of budgets that have been coming out of the White House lately reminds me of those movies called ''Nightmare on Elm Street.'' They have a few good scares, mixed with a lot of unintentional comedy. The emphasis clearly is on quantity, not quality, and they offer few, if any, redeeming values. There have been so many of them that after a while, you just start losing count.

Just to recap: We are talking budgets. We have had Clinton I. That failed in the Senate 99 to 0;

Clinton II that did not get a single vote in the Senate as well, Republican or Democrat;

Clinton III, that one was pulled before we could even vote on it;

And just last Friday, Clinton IV. The Senate did not waste our time on it after the House late Wednesday dealt a resounding blow by defeating it on a bipartisan vote of 412 to 0.

Four budgets submitted by President Clinton, four major disappointments, and not one vote from a single Member of this Congress to support any of them.

What is it about the President's vision of a balanced budget that is so different from everyone else's? By refusing to use honest budget numbers certified by the Congressional Budget Office, the President's budgets have failed the first true test of a balanced budget: They never come close to being balanced.

Yet, there are encouraging signs that the White House is shifting its ever-shifting budget policy and now wants to cooperate with Congress to produce the kind of budget plan that the American people are demanding: A balanced budget attainable by the year 2002 that reaches balance by cutting the growth of Federal spending and does not raise taxes, that, in fact, cuts taxes.

Following his meeting Tuesday afternoon with Senator DOLE and Speaker GINGRICH, I welcome the news that President Clinton has finally agreed to work with us, using the economic projections of the CBO, to craft a plan that will bring the Federal budget into balance within 7 years.

It was his refusal to commit to such a basic promise 6 days ago that, once again, led to a Government shutdown, this time idling a quarter of a million Federal employees. They, and the American people who are forced to pay the salaries of workers who are not allowed to work when the Government shuts down, ought to be furious that the President would let this happen, especially so close to the holidays.

I hope that by opening the door to now legitimate budget negotiations, the President will sign an agreement reopening the Government and sending these people back to work immediately. As for the balanced budget plan itself, President Clinton was quoted this week as saying, ''I hope we can resolve this situation and give the American people their Government back by Christmas. We also should give them a balanced budget that reflects our values of opportunity, respecting our duty to our parents and our children, building strong communities and a strong America.''

I could not agree more with the President, but it seems he is doing his Christmas shopping just a little late this year. By so far denying the American people the benefits of a balanced budget, he is making the goals that we share, those expanded opportunities, strong communities and a strong America, a lot more difficult to reach. Both the businesses lining Main Street and the Americans who spend their dollars in them are nervous, wondering if Washington is, once again, going to let them down.

Monday's drop of more than 100 points in the stock market—and that is the worst drop in the market in 4 years—and yesterday's 50-point dive is a clear sign that a skittish business community is having real doubts that Washington is serious about ever balancing the Federal budget.

That lack of a balanced budget is causing real economic hardship for American families, and individuals as well, because for the residents of my home State of Minnesota, the benefits that they would reap from our balanced budget legislation would be deep and it would be lasting.

The statistics tell it all. In fact, if President Clinton had signed the Balanced Budget Act that we originally sent him last month, the average Minnesotan would be saving right now $2,600 a year from lower mortgage payments; over $1,000 over the life of a 4-year loan of a car worth $15,000; nearly $1,900 on the life of a 10-year student loan of about $11,000; and over $300 every year from lower State taxes due to lower State and local interest payments; and also, Mr. President, nearly $600 a year from lower interest payments on a student loan.

If President Clinton had signed the Balanced Budget Act, Minnesota families would have received a tax credit as well, a tax credit that would have helped over 529,000 Minnesota taxpayers with over 1 million dependents. That is more than $477 million of their own money every year these working families would have been allowed to keep.

The tax credit would have completely eliminated the Federal income tax bill for over 45,000 Minnesotans, and that is another $38 million every year that would stay with these working families.

The tax credit would have paid for nearly 4 years of tuition at the University of Minnesota Twin Cities campus if the parents were able to bank the $500 per child tax credit for 18 years. Or the tax credit could have saved average Minnesota families enough to buy 3 months of groceries or make 1½ mortgage payments, or pay electric bills for 11 months.

Mr. President, the people are calling on this Congress, this President, to balance the budget because they have heard those same old statistics and it sounds pretty good to them. Of course, the other component of our budget plan is our $245 billion package of tax relief, and there are real concerns outside Washington that it, the centerpiece of our budget, may be negotiated away.

I would like to show on the chart where we stand on tax relief compared to spending and how much has already been negotiated away over these last couple of months.

We started out spending $11.2 trillion. That has grown to the latest Clinton budget of over $12.4 trillion. So spending has continued to increase under these budget plans.

But at the same time, they continue to whittle away at the tax relief for Americans. It started out at $354 billion of tax relief over 7 years in the House plan to $245 billion under the Senate plan and now the Clinton budget wants to cut this back to $78 billion, or even less.

So we can see over months of negotiations which way they are headed. It is the same old scenario: More spending, but take it away from taxpayers, and less tax relief.

I urge the budget negotiators to stand firm in their commitment to the taxpayers of this Nation to let them keep more of the dollars that we are routinely snatching out of their pockets. We need to stop Washington's nasty habit of taking money out of the checkbooks of taxpayers and putting them into the checkbooks of politicians.

I remind my colleagues that $245 billion is a lot of money to the taxpayers